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In the Supreme Court of the United States

OCTOBER TERM, 1982

BREWTON FASHIONS, INC., A DIVISION OF JUDY BOND, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

WILLIAM A. LUBBERS
General Counsel

JOHN E. HIGGINS, JR.
Deputy General Counsel

ROBERT E. ALLEN
Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

LINDA SHER
Assistant General Counsel

PENNY PILZER
Attorney

National Labor Relations Board
Washington, D.C. 20570

QUESTION PRESENTED

Whether substantial evidence supports the Board's finding that petitioner discharged two employees because of their union and other protected activities rather than because of their refusal to perform certain work that they contended was beyond their physical capacity.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A-1 to A-15) is reported at 682 F.2d 918. The decision and order of the National Labor Relations Board (Pet. App. A-16 to A-18) and the underlying decision of the administrative law judge (Pet. App. A-19 to A-35) are reported at 252 N.L.R.B. 1038.

JURISDICTION

The judgment of the court of appeals was entered on August 13, 1982 (Pet. App. A-37). A petition for rehearing was denied on October 18, 1982 (Pet. App. A-36). The petition for a writ of certiorari was filed on January 12, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, 29 U.S.C. 151 *et seq.*, are set forth at Pet. 2-3.

STATEMENT

1. Petitioner manufactures women's blouses at its facility in Brewton, Alabama. In March 1979, as part of an efficiency drive begun in the fall of 1978, employee Kathleen Chavers was informed that, in addition to her duties as trimmer in the cutting room, she would be required to push into the sewing room the cart into which she had placed her finished material. The cart weighed between 300 and 700 pounds when loaded, and its wheels often became clogged with refuse from the cutting room floor (Pet. App. A-12, A-31). After pushing the cart on one occasion in response to the instruction, Chavers told her supervisor that the cart was too heavy for her to push by herself. Thereafter, fellow employee Grace Boozer assisted Chavers in pushing the cart into the sewing room, and together they unloaded its contents (*id.* at A-3, A-21). Both Chavers and Boozer are small, middle-aged women, and both had experienced serious health problems before the spring of 1979 (*id.* at A-31). Both were long-term employees with excellent work records (*id.* at A-29).

On March 30, Plant Manager Robert Bays called Chavers and Boozer to his office and questioned them about their refusal to push and unload the cart individually, as they had been told to do. The employees replied that they were physically unable to push the cart alone. Bays informed them they must either perform the work as directed or not return to work the following Monday. Despite Bays' ultimatum, Chavers and Boozer reported to work on Monday, April 2, and continued to push the cart together. Later in the day, they were again called to Plant Manager Bays' office; they again told Bays that they were physically unable

to push the cart alone. The meeting ended without a resolution of the matter, and Chavers and Boozer continued to push and unload the cart together, despite the requests of their immediate supervisor, Charles Hawkins, that they push it alone (Pet. App. A-4, A-21 to A-22). On April 23, Chavers and Boozer met with James Byrd, petitioner's Vice-President of Manufacturing, and again protested that they were physically unable to push the cart alone. Byrd told them that they must perform the job as instructed, that is, by pushing the cart individually (*id.* at A-5, A-22 to A-23).

Meanwhile, a union organizing campaign began at petitioner's facility in April. Petitioner knew of the drive soon after it began and was aware that Chavers and Boozer were involved with the union during this period (Pet. App. A-4, A-30 to A-31). On various occasions during the union drive, petitioner's supervisory personnel expressed animus toward the union, interrogated an employee concerning union activities, suggested that union activity might lead to discharge of an employee, and created the impression of surveillance of union activities (*id.* at A-4 to A-9, A-28 to A-29).

On June 18, 1979, Chavers and Boozer were called into Plant Manager Bays' office. When they again insisted that they were unable to push the cart individually, they were terminated (Pet. App. A-6). Thereafter, Plant Manager Bays asked another employee if she wanted the job of pushing the cart. The employee declined on the ground that an asthmatic condition prevented her from performing such strenuous work. She was neither disciplined nor fired as a result of her refusal (*id.* at A-13, A-25). Thereafter,

employees occasionally teamed up to push the cart (*id.* at A-32 n.20).[1]

2. The Board, adopting the decision of the Administrative Law Judge ("ALJ"), held, *inter alia,* that petitioner violated Section 8(a)(1) and (3) of the Act, 29 U.S.C. 158(a)(1) and (3), by discharging Chavers and Boozer because of "their union or other protected activities" (Pet. App. A-17 n.2, A-32). In finding that the discharges were motivated by animus toward the union activities of the two employees, the ALJ relied on "the timing of the discharges during the midst of the Union's campaign," disparate treatment of Chavers and Boozer compared with other employees who were not required to push the cart alone, independent evidence of petitioner's hostility to the union, including its unlawful response to the union campaign,[2] and the fact that Chavers had been expelled from the plant in violation of the Act on an earlier occasion[3] (*id.* at A-32).

The ALJ further found that petitioner's proffered explanation for the discharge — that Chavers and Boozer interfered with petitioner's efficiency drive by failing to push the cart into the sewing room individually — was pretextual. The ALJ pointed out that "the record failed to show that [the employees'] work efficiency suffered as a result of their joint efforts in pushing and unloading the cart," and that

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[1]In addition, in 1978 three employees had refused to push the cart alone after they were asked to do so. None was disciplined for refusing to perform the task (Pet. App. A-13, A-30).

[2]The Board, upheld by the court of appeals, found that petitioner violated Section 8(a)(1) of the Act by interrogating employee Pugh about her union activities, threatening her with discharge because of those activities, and creating the impression that employees' union activities were under surveillance (Pet. App. A-6 to A-9, A-25 to A-29). Petitioner does not challenge that finding in its petition.

[3]See *Brewton Fashions, Inc.* v. *NLRB,* 361 F.2d 8 (5th Cir.), cert. denied, 385 U.S. 842 (1966).

petitioner "did not deny that that joint activity occupied only a small portion of their worktime" (*id.* at A-29 to A-30). Furthermore, "[n]o explanation was offered as to why [petitioner] decided to discharge two valuable employees for action which it permitted in other employees both before and after their discharge. Nor did [petitioner] show with persuasion why it permitted Boozer and Chavers to push the cart together for over 2½ months without taking corrective action" (*id.* at A-30). The ALJ also concluded (*id.* at A-31) that Boozer's and Chavers' protest against pushing the cart was protected concerted activity. He found no evidence to suggest that either of the employees was insincere in expressing the belief that she would be hurt physically by pushing the cart alone. The ALJ concluded that the two employees acted in concert when they went to Vice President Byrd on April 23 and protested that the job of pushing the cart individually was too much for either of them (*ibid.*).

The Board ordered, *inter alia*, that Boozer and Chavers be reinstated with backpay (Pet. App. A-18).

3. The court of appeals upheld the Board's decision and enforced its order (Pet. App. A-1 to A-15). The court rejected petitioner's contention that Chavers and Boozer "were lawfully terminated for refusing to perform their work as directed" (*id.* at A-9). The court concluded (*id.* at A-10) that substantial evidence supported the Board's finding that petitioner's "asserted basis for the employees' termination was pretextual, and that Chavers's and Boozer's discharges were the result of their 'union and protected, concerted activities.' " The court noted, *inter alia*, that "Chavers and Boozer were treated differently from other Brewton employees who had also refused to push the cart alone" (*id.* at A-13). The court also concluded that substantial evidence supported the Board's finding that Chavers'

and Boozer's protest against pushing the cart constituted protected concerted activity (*ibid.*).

On January 31, 1983, Justice Powell denied petitioner's application for a stay of the judgment pending disposition of the petition for a writ of certiorari.

ARGUMENT

Petitioner contends that this case involves an application of the test articulated by the Board in *Wright Line, A Division of Wright Line, Inc.*, 251 N.L.R.B. 1083 (1980), enforced, 662 F.2d 899 (1st Cir. 1981), cert. denied, 455 U.S. 989 (1982), concerning allocation of the burden of proof in "dual motive" cases.[4] This Court on November 15, 1982, granted certiorari in *NLRB* v. *Transportation Management Corp.*, No. 82-168, which raises the question of the propriety of the burden-shifting aspect of the Board's *Wright Line* test, and petitioner urges that the Court should review this case as well. However, unlike *Transportation Management*, this is not a dual motive case. Rather, the question here is simply whether substantial evidence supports the Board's finding that petitioner's proffered ground for discharging two employees was pretextual, and that the employees were discharged solely because of their union activity. Accordingly, review by this Court is not warranted.

Under the Board's *Wright Line* test, once the Board's General Counsel has established by a preponderance of the evidence that opposition to an employee's protected activities was "a motivating factor" in the employer's decision to discharge an employee, the employer nevertheless can prevail if it shows by a preponderance of evidence that it would have taken the same action "even in the absence of the protected conduct." *Wright Line, supra*, 251 N.L.R.B. at

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[4]Dual motive cases are those in which a discharge or other disciplinary action is motivated by both legitimate and unlawful considerations.

1089. The First Circuit rejected the Board's test insofar as it places on an employer shown to have acted for an impermissible reason the burden of proving, rather than merely producing evidence, that it would have taken the same action in the absence of the protected activity. 662 F.2d at 905. The burden-shifting aspect of the Board's test, which the First Circuit rejected and which is at issue in *Transportation Management,* relates to cases in which it has been shown that the employer had two motives, one lawful and one unlawful. The Board explained in *Wright Line* that if examination of the employer's evidence reveals that "the asserted justification is a sham, in that the purported rule or circumstance * * * did not exist, or was not, in fact, relied upon," no further analysis as to motive is necessary, since animus toward the employee's concerted activities has been shown to be the only reason for the discharge. 251 N.L.R.B. at 1084. The First Circuit did not address this portion of the Board's *Wright Line* decision; indeed, in *Wright Line* itself the court upheld the Board's order because it agreed with the Board that the employer's alleged legitimate reason for the discharge was a pretext. 662 F.2d at 907-909 & n.13.

Here the Board found that the record established that petitioner discharged the two employees because of their union and other protected activity and that petitioner's asserted legitimate reason for the discharge of the two employees was a pretext (Pet. App. A-17, A-29 to A-33). The court of appeals concluded that substantial evidence supported the Board's findings (*id.* at A-9 to A-15). Neither the Board nor the court of appeals even referred to the *Wright Line* test, and neither suggested that any burden of persuasion had been placed on the employer. Thus, the question raised in *Transportation Management* simply is

not presented in this case.[5] The question actually presented — whether the Board's findings are supported by substantial evidence — is one that does not warrant review by this Court. *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 491 (1951).[6]

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[5]Petitioner relies (Pet. 6) on a statement in the court of appeals' opinion (Pet. App. A-11) (emphasis in original) that "the Board is not required to establish substantial evidence that conduct is motivated *solely* by anti-union animus. It is sufficient if substantial evidence shows that the force of antiunion purpose was '*reasonably equal*' to the lawful motive prompting conduct," citing *NLRB* v. *Aero Corp.*, 581 F.2d 511, 514-515 (5th Cir. 1978), "and that discharge would not have occurred in the absence of protected activity." Like this case, the *Aero Corp.* case, from which the court quoted, did not involve a situation in which the evidence established both lawful and unlawful reasons for a discharge but instead was a case in which the court of appeals concluded that substantial evidence supported the Board's finding that the alleged lawful reason was a pretext and that the only true motive was an unlawful one. The court in *Aero Corp.* rested its decision primarily on the settled principle that a reviewing court may not "displace the Board's choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo*." *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 488 (1951). See also *Consolo* v. *Federal Maritime Commission*, 383 U.S. 607, 620 (1966). To the extent the language relied on by petitioner goes further, it appears to be dictum, for it is clear that the evidence supporting the Board's finding of unlawful motivation for the discharges is more than "reasonably equal" to any evidence showing a lawful motive (see note 6, *infra*.).

[6]In any event, the court of appeals properly concluded that substantial evidence supported the Board's finding that petitioner's asserted lawful reason for the discharges was a pretext and that its true motive was an unlawful one. The evidence showed that petitioner was aware that both Chavers and Boozer were actively involved with the union, that their supervisor had made an anti-union remark to Boozer, that the two were terminated after several other incidents that demonstrated petitioner's anti-union animus, that Chavers and Boozer were first

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

WILLIAM A. LUBBERS
General Counsel

JOHN E. HIGGINS, JR.
Deputy General Counsel

ROBERT E. ALLEN
Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

LINDA SHER
Assistant General Counsel

PENNY PILZER
Attorney
National Labor Relations Board

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reprimanded for refusal to push the cart alone two and one half months prior to the date of their terminations, that both were long-term employees with good work records, that their work efficiency did not suffer as a result of their joint efforts in pushing and unloading the cart, and that other employees had not been disciplined for refusing to push the cart individually. See Pet. App. A-10 to A-11, A-29 to A-31.